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A.Y., Appellant)	
)	
and)	Docket No. 18-1463
)	Issued: March 5, 2019
SOCIAL SECURITY ADMINISTRATION,)	
Escondido, CA, Employer)	
)	

Case Submitted on the Record

James M. Yates, for the appellant¹
Office of Solicitor, for the Director

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On July 23, 2018 appellant, through her representative, filed a timely appeal from a June 15, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 14, 2018, due to her failure to attend a scheduled medical examination.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On December 17, 1992 appellant, then a 49-year-old service representative, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment. On March 17, 1993 OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and left ganglion cyst. Appellant underwent authorized left carpal tunnel surgical release on June 25, 1993. On July 16, 1993 OWCP entered appellant on the periodic rolls for wage-loss compensation.

By letter dated July 5, 1995, OWCP proposed to reduce appellant's compensation based on her capacity to earn wages as a general clerk. By decision dated August 7, 1995, it determined appellant's loss of wage-earning capacity (LWEC) was properly based upon the constructed position of general clerk.

On August 28, 2006 appellant requested that OWCP modify the August 7, 1995 LWEC determination as the original decision was in error. She alleged that she was totally disabled and that the August 7, 1995 decision was not based on reasonably current medical evidence.

By decision dated November 8, 2006, OWCP declined to reopen appellant's claim for review of the merits finding that her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

In a letter dated November 19, 2006, appellant requested modification of the August 7, 2005 LWEC determination. By decision dated February 9, 2007, OWCP again declined to reopen appellant's claim for consideration of the merits as it found her request was untimely filed and failed to demonstrate clear evidence of error. On February 27, 2007 appellant appealed the

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 15, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Docket No. 07-0981 (issued September 19, 2007).

November 8, 2006 and February 9, 2007 OWCP decisions to the Board. By decision dated September 19, 2007, the Board remanded the case for OWCP to issue a merit decision regarding appellant's request for modification of the LWECD determination finding that OWCP improperly characterized appellant's request for modification, which is not subject to a one-year time limitation, as a request for reconsideration.

By decision dated December 5, 2007, OWCP modified the August 7, 2005 LWECD determination and granted appellant additional wage-loss compensation.

In letters dated October 24 and 31, 2016, appellant, through her representative, asserted that she had experienced a stroke with a traumatic brain injury in 2014. In support of her allegations, appellant provided an October 27, 2017 work capacity evaluation (OWCP-5c) from Dr. Mark H. Fletcher, a neurologist. He found that appellant was totally disabled due to her stroke and associated complications.

On December 5, 2016 appellant, through counsel, contended that her accepted conditions should be expanded to include fibromyalgia. In a development letter dated March 8, 2017, OWCP requested additional medical evidence in support of appellant's claimed employment-related fibromyalgia. It afforded 30 days for response. By decision dated September 28, 2017, OWCP denied appellant's request to expand the acceptance of her claim to include the additional condition of fibromyalgia.

In an undated letter issued on January 4, 2018, OWCP advised appellant that an appointment had been scheduled for her in order to obtain a second opinion as to the nature and extent of any residuals of her accepted work-related conditions. It explained that her entitlement to compensation could be suspended, pursuant to 5 U.S.C. § 8123(d), if she refused to submit to or obstructed an examination.

By letter dated February 23, 2018, OWCP referred appellant for a second opinion evaluation with Dr. Howard Leslie Fowler, an orthopedic surgeon, for an appointment scheduled on March 20, 2018 at 11:30 a.m.

In a statement dated March 23, 2018, appellant, through her representative, alleged that she was unable to attend the scheduled evaluation due to seizures related to her previous stroke and traumatic brain injury as well as due to heart arrhythmia and syncope. It was further noted that appellant had been hospitalized in critical condition for two weeks in January 2018 and spent an additional two weeks in a nursing home. She required additional cardiac evaluation which would be completed in April 2018. Appellant requested that the second opinion evaluation be rescheduled with consideration of her other medical treatments.

In a letter dated March 27, 2018, a case coordinator notified OWCP that appellant had not kept the scheduled appointment with Dr. Fowler on March 20, 2018 at 11:30 a.m.

On April 12, 2018 OWCP rescheduled appellant's second opinion evaluation with Dr. Fowler. The appointment was scheduled for April 25, 2018 at 2:45 p.m.

In a letter dated April 30, 2018, a case coordinator notified OWCP that appellant had not attended the examination with Dr. Fowler scheduled on April 25, 2018 at 2:45 p.m.

On May 10, 2018 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA due to her failure to attend the April 25, 2018 examination with Dr. Fowler. It advised appellant that she should provide a written explanation of her reasons for failing to attend the scheduled examination, with substantive corroborating evidence within 14 days.

In a letter dated May 19, 2018, appellant's representative argued that appellant was very sick and disabled. He noted that appellant had scheduled an examination with her attending physician on May 29, 2018 with regard to the current status of her carpal tunnel syndrome. Appellant noted, "Hopefully this will be satisfactory." In support of her allegations, appellant provided a copy of her personal health record which allowed her to edit or delete information. This document included a listing of over 100 medical issues.

By decision dated June 15, 2018, OWCP finalized its proposed suspension, effective June 14, 2018. It informed appellant that she had not established good cause for her failure to attend the scheduled April 25, 2018 appointment with Dr. Fowler. It noted that while appellant reported that she was scheduled for an orthopedic examination, she had not submitted a report from that examination establishing a medical cause for her failure to attend the April 25, 2018 appointment. OWCP noted that her benefits would be reinstated only after verification that she attended and cooperated with an examination by Dr. Fowler.

LEGAL PRECEDENT

Section 8123 of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.⁵ The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP.⁶ OWCP's regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.⁷ Section 8123(d) of FECA and OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁸ OWCP's procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.⁹ If good cause for the refusal or obstruction is not

⁵ 5 U.S.C. § 8123.

⁶ *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008); *S.B.*, 58 ECAB 267 (2007); *James C. Talbert*, 42 ECAB 974 (1991).

⁷ 20 C.F.R. § 10.320.

⁸ *Supra* note 5; 20 C.F.R. § 10.323; *L.B.*, *supra* note 6; *Dana D. Hudson*, 57 ECAB 298 (2006).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.¹⁰

ANALYSIS

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 14, 2018, due to her failure to attend a scheduled medical examination on April 25, 2018.

By letter dated January 4, 2018, OWCP notified appellant that she was being referred for a second opinion examination to determine the nature and extent of any residuals of her accepted injuries. It informed her of her obligations to attend and cooperate with the examination. The notice clearly explained that appellant's compensation benefits would be suspended for failure to report to or for obstruction of the examination. By letter dated April 12, 2018, OWCP advised her of the date and time of her appointment with Dr. Fowler. It also provided appellant with Dr. Fowler's address. As noted, she did not appear for the appointment, nor did she attempt to reschedule the appointment prior to the designated time

The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP. The only limitation on this authority is that of reasonableness.¹¹

Appellant's refusal to submit to the medical examination warrants suspension of entitlement to compensation unless she can establish good cause for her failure to report at the scheduled time. The Board finds that she has not established good cause for her failure to report to the scheduled examination with Dr. Fowler. In a letter dated May 19, 2018, appellant alleged that she was very sick and disabled. However, she has not provided evidence to corroborate her allegations. Appellant's personal health record is not medical evidence as it was not signed by a physician¹² and it does not establish her inability to attend the April 25, 2018 appointment with Dr. Fowler. Without evidence to support her allegation that she was too ill to attend the scheduled appointment, it is nothing more than an unsubstantiated excuse.¹³

Appellant also noted that she had scheduled an examination with her attending physician on May 29, 2018 in regard to the current status of her carpal tunnel syndrome. OWCP scheduled an appointment with Dr. Fowler for a second opinion evaluation which appellant failed to attend. The fact that she later planned to seek treatment from her physician does not justify her failure to

¹⁰ *Id.*

¹¹ *P.K.*, Docket No. 18-0179 (issued May 22, 2018); *Lynn C. Huber*, 54 ECAB 281 (2002).

¹² *R.T.*, Docket No. 17-1353 (issued December 3, 2018); *R.M.*, 59 ECAB 690 (2008).

¹³ *P.K.*, *supra* note 11; *L.M.*, Docket No. 17-2025 (issued March 22, 2018).

attend the scheduled second opinion examination.¹⁴ There is no evidence in the record that OWCP abused its discretion in directing the examination.

Thus, the Board finds that OWCP properly suspended entitlement to compensation effective June 14, 2018 in accordance with 5 U.S.C. § 8123(d) until the date on which appellant agrees to attend the examination. When appellant actually reports for examination, payment retroactive to the date on which she agreed to attend the examination may be made.¹⁵

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits pursuant to 5 U.S.C. § 8123(d), effective June 14, 2018, due to her failure to attend a scheduled medical examination.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *M.F.* Docket No. 15-1367 (issued October 6, 2015).

¹⁵ *D.K.*, Docket No. 18-0217 (issued June 27, 2018); *L.B.*, Docket No. 14-2005 (issued January 28, 2015); *E.B.*, 59 ECAB 298 (2008).